Bay State Gas Company *and* Lawrence W. Wysocki.
Case 1-CA-16756

April 7, 1981

DECISION AND ORDER

On July 21, 1980, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and finds merit in Respondent's exceptions. Accordingly, the Board has decided to affirm the findings,[1] conclusions, and recommendations of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent discharged employee Lawrence W. Wysocki, hereinafter called Wysocki, because he filed a workmen's compensation claim and an unfair labor practice charge in violation of Section 8(a)(1) and (4) of the Act. We disagree and find that the General Counsel has not established that Respondent's discharge of Wysocki was influenced either by his filing the workmen's compensation claim or by his filing of the unfair labor practice charge.

Wysocki has been an employee of Respondent, a public utility, for almost 20 years, and at the time of the incidents involved herein, he was a grade 4 dispatcher.[2] On June 8, 1979,[3] at 3 a.m., Wysocki was physically attacked and injured while working the dispatcher's desk. As a result of his injuries Wysocki was medically advised to remain away from work until June 18. Sometime after June 8 Wysocki filed for and received workmen's compensation payments as a result of his injuries.[4]

Upon his return to work on June 18, Supervisor Fred Cabana asked Wysocki to produce a doctor's release in order to work. Wysocki told Cabana that he did not have one and that his return to work on a trial basis had already been discussed by Dr. George Sotirion, his physician, and William Black, manager of the customer service department (Cabana's supervisor). Cabana then told Wysocki that he would not be permitted to work without a doctor's release and further that Wysocki would no longer be given the one-half hour per day overtime he had previously received. Cabana also criticized Wysocki's work in general, with emphasis on some alleged damage to a computer done while Wysocki was under medication shortly after the June 8 incident. At this point, Wysocki began experiencing heart palpitations and requested that he be allowed to go home. Cabana consented to Wysocki's request but conditioned it on Wysocki signing a leave slip.

Thereafter, Wysocki sought and, for some time, remained under medical care for his heart palpitations as well as for exacerbation or recurrence of his back pain. During this period, he kept Cabana and Black, as well as other management officials, apprised of his condition, and at one point inquired about job openings which had been posted for bidding. Joseph Fimognari, Respondent's labor relations and compensation manager, informed Wysocki that a posted job had been awarded to a bargaining unit member.

On August 8, Wysocki filed an unfair labor practice charge against Respondent alleging, *inter alia*, that "the Employer has reduced my hours and benefits, refused to promote me into vacant job positions, failed to grant my request to transfer back to the bargaining unit . . . because of my union activity while a member of the union bargaining unit and thereafter." On September 4, Wysocki filed a workmen's compensation claim based on the June 18 incident. Thereafter, on September 11 Wysocki withdrew the unfair labor practice charge.

Pursuant to his physician's October 13 suggestion that he attempt to return to work on a trial basis, Wysocki telephoned Supervisor Cabana on October 15 and informed him of his return to work. According to Wysocki, Cabana expressed gratification, but within less than an hour Fimognari telephoned Wysocki and told him he was reading a letter which Fimognari was sending Wysocki by registered mail, terminating his employment as of October 15. The letter stated that Wysocki's termination on October 15 was due to excessive absenteeism.[5] Respondent paid Wysocki his full salary from the time of the June 8 injury until his discharge on October 15.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Until his promotion in 1977, Wysocki was a member of the street utility repair department and a member of the union-represented bargaining unit.

[3] All dates herein are 1979 unless otherwise specified.

[4] Apparently this claim, like numerous others, for workmen's compensation was filed on behalf of Wysocki by Respondent.

[5] The record establishes that throughout his employment Wysocki has been involved in a number of industrial accidents and that he had been ill quite frequently. Thus from 1961 to 1977 Wysocki was absent 323 days due to personal illness and 585 days due to accidents. From 1977 when he became a dispatcher to 1979, Wysocki lost 42-1/2 days due to accidents and 95 days due to personal illness.

The Administrative Law Judge concluded that Respondent's discharge of Wysocki for excessive absenteeism resulting from the very accident for which he filed a workmen's compensation claim tended to coerce and restrain other employees as well as the claimant in violation of Section 8(a)(1) of the Act. He further found that the asserted reasons advanced by Respondent for Wysocki's discharge were pretextual. Finally, the Administrative Law Judge also concluded that Wysocki's discharge was at least in part motivated by his filing an unfair labor practice charge and thus violative of Section 8(a)(4) of the Act.

We find that the General Counsel has not sustained its burden to establish a *prima facie* case that Wysocki was discharged because he filed a workmen's compensation claim. There is no evidence that Respondent's discharge of Wysocki was motivated by his filing of his claim. Indeed, during the past 18 years Respondent has been faced with several such claims from Wysocki and has never exhibited any concern about these claims. To the contrary, it has routinely assisted him in filing such claims. There is nothing to indicate that this claim was so different that while Respondent did not object to the other claims it decided to discharge Wysocki for filing this particular claim.

The Administrative Law Judge bases his findings of a violation on his conclusion that if an employee may not, under the Act, be discharged for filing a workmen's compensation claim he may not be discharged for his absence from work because of the very circumstances which gave rise to the claim. He ruled that to hold otherwise would render the Act's protection against discharge for filing the claim nugatory, as the reason for the absence would be cited as the reason for the discharge rather than the claim itself. The Administrative Law Judge's concerns appear to be directed to the difficulty of ascertaining the actual motive for a discharge. However, such a holding would immunize an employee from being discharged for absenteeism as long as he filed a workmen's compensation claim covering the cause of the absenteeism.

Motivation is an issue which the Board faces in numerous cases on a daily basis. Frequently, it is not easy to ascertain whether the cited reason for the discharge is the actual reason. However, that fact does not justify a holding by the Board that it will not consider a lawful reason put forth by an employer for a discharge merely because it might be used to cover up an unlawful reason. Rather, we must determine in each case, including this one, whether the discharge was for the filing of the claim or whether the discharge was for the absenteeism.

Alternatively, the Administrative Law Judge finds, upon the record as a whole, that the excessive absenteeism reason advanced by Respondent for Wysocki's discharge was pretextual. He notes that Respondent conceded it had no dissatisfaction with his previous work performance; it had no previous intention of laying off Wysocki; it discharged Wysocki within the allowable 6-month sick leave period; it took no issue with his absence until he indicated he was returning; and without explanation it produced no records of other employees to support its assertions that his absences were excessive or resulted in substantial inconvenience to the Company, or for comparison purposes to show they were extraordinary or excessive, or that its discharge of Wysocki was not disparate. Some, and perhaps all, of these findings may raise questions concerning Respondent's stated reason for the discharge. However, where as here, the General Counsel has not, as discussed above, established a *prima facie* case that the discharge was for filing a workmen's compensation claim, mere suspicion concerning the stated reasons for the discharge is an insufficient basis for establishing a violation. We shall, therefore, dismiss this allegation.[6]

We further find that the General Counsel has failed to sustain its burden of establishing a *prima facie* case that Respondent violated Section 8(a)(4) of the Act when it discharged Wysocki. The unfair labor practice charge was filed almost 2 months prior to Wysocki's discharge and withdrawn on September 11, almost 1 month before his discharge. The General Counsel has not established any *nexus* between Wysocki's filing of the charge and his subsequent discharge. To the contrary the fact that the discharge occurred almost 1 month after the withdrawal tends to show that the filing of the charge was unlikely to have been the motivating factor in Wysocki's dismissal. Thus, we find that the General Counsel has failed to sustain its burden of proving that Respondent violated Section 8(a)(4) of the Act by discharging Wysocki because he filed an unfair labor practice charge.

Accordingly, we find that Respondent did not violate Section 8(a)(4) and (1) of the Act by discharging employee Wysocki. We shall therefore dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

[6] In view of this determination we find it unncessary to pass on the Administrative Law Judge's finding that even if Wysocki had been a supervisor his discharge for filing a workmen's compensation claim would be unlawful, since it would nevertheless coerce and restrain employees.

lations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

I. PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding[1] under the National Labor Relations Act as amended, 29 U.S.C § 151, *et seq.* (hereinafter referred to as the Act), was heard before me in Northampton, Massachusetts, on May 8-9, 1980, with all parties participating throughout by counsel (Charging Party by the General Counsel) and afforded full opportunity to present evidence, arguments, proposed findings and conclusions, and briefs. After unopposed applications by Respondent and by the General Counsel for extensions of time, briefs were received on July 7, 1980. Proofs and briefs have been carefully considered.

The basic issues presented are whether Respondent Employer violated Section 8(a)(1) and (4) of the Act by discharging the Charging Party from its employ because he filed a workmen's compensation claim and an unfair labor practice charge.

Upon the entire record[2] and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

II. JURISDICTION

At all material times, Respondent has been and is a Massachusetts corporation, with office and place of business in Springfield in that Commonwealth or State, engaged as a public ultility in transmission, distribution, and sale of natural gas. During the representative 12-month period immediately preceding issuance of the complaint, Respondent in the course and conduct of that business derived gross revenues exceeding $250,000 and received at its Springfield facility, directly in interstate commerce from places outside of Massachusetts, goods and materials valued at over $50,000.

I find that at all material times Respondent has been and is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts as Found*

According to the charge, Respondent public utility employs at its Springfield, Massachusetts, division, the location here involved, some 300 employees. These include Charging Party Lawrence W. Wysocki (40 years old, with five children), who has been in its employ for almost 20 years. From 1961 to 1977, when (March 1977) he became an assistant dispatcher, Wysocki was a member of a union-represented bargaining unit of Respondent's employees. During that time, as a member of the street (utility repair) department, he sustained various industrial accidents, including broken bones, as well as a back injury resulting in recurring symptoms and lost worktime. In March 1977, Wysocki was promoted to grade 3 assistant dispatcher, an "office" job, and within 3 months he was further advanced to grade 4 dispatcher, with an expression of satisfaction with his job performance by Respondent's Customer Service Department Chief Black, the superior of Wysocki's supervisor Cabana (supervisor of the Customer Service and Dispatch Office).

While at work in Respondent's dispatch office on June 8, 1979, at around 3 a.m., Wysocki was attacked and injured by an intruder, resulting in injuries to Wysocki's back and arms. The incident was immediately reported to the police as well as to Black, and, after 2 days of attempted self-medication because of inability to secure treatment in the hospital emergency room, Wysocki was medically advised to remain away from work, which he did until June 18.[3] By reason of these injuries, Wysocki filed a workmen's compensation claim and was paid by Respondent's insurance carrier.

On June 18, 1979, Wysocki reported back to work. His supervisor, Cabana, asked him to produce a doctor's release. Wysocki indicated he had brought none, explaining that he was under the impression from a conversation the previous week with Black (Cabana's superior) that Black had spoken directly with Wysocki's physician, Dr. Sotirion an orthopedic surgeon; and that Dr. Sotirion had medically authorized his return on a trial basis. Cabana thereupon, without further ado, informed Wysocki that he was no longer to be given overtime—in effect a $4 per day reduction in Wysocki's pay, since he had been working 1/2 hour per day overtime daily since he had started as a dispatcher.[4] On top of this, Cabana suddenly commenced criticizing Wysocki's work, including some alleged damage to a computer Wysocki had been using on June 9 while attempting to work under sedation before being able to obtain a medical appointment following his described injuries sustained in his encounter with the intruder into Respondent's premises. During the ensuing heated discussion, Wysocki experienced heart palpitations and became highly overwrought over the direction things were taking, leading to his requiring subsequently continuing medical attention for severe chest and left shoulder pains, and he left, but not before signing a leave slip at Cabana's insistence.[5]

Thereafter, Wysocki remained under medical care, but also for the nervous or other condition triggered by the described rancorous exchange with Cabana, as well as for exacerbation or recurrence of his back pain, keeping Cabana, as well as, at times Black (and also Personnel

[1] Based on a complaint issued on December 11, growing out of a charge filed October 24 as amended November 30, 1979, by the above Charging Party employee against Respondent Employer. Unless otherwise specified, dates throughout are in 1979.

[2] Transcript corrected in accordance with the General Counsel's unopposed July 3, 1980, motion and Respondent's unopposed July 7 motion, each hereby granted.

[3] Except for being present for sedentary telephone-answering in the dispatch office for 2 hours on Sunday, June 10, at Respondent's request because of its inability to obtain a substitute that day.

[4] I credit Wysocki's uncontradicted denial that he had been told prior to this that his overtime was going to be discontinued.

[5] At the hearing, Respondent conceded that Wysocki was not terminated for failure to bring in a medical release when he attempted to return to work on June 18.

Secretary Linda Burke and Respondent's Labor Relations and Compensation Manager Fimognari), closely and promptly informed by telephone of his progress after each medical appointment.[6] Wysocki informed Cabana as well as Black that he had not yet been medically released for return to work and, according to his testimony, received from both of them expressions that they were "glad you're feeling better" and assurances that they "hope to see you soon."[7] In conversations with Fimognari, Wysocki indicated his desire to be considered for other jobs that were being posted, but without result except to be informed by Fimognari that a posted job had been awarded to a bargaining unit member.[8]

Wysocki last reported to Cabana on the telephone on October 15, concerning medical advice received from his physician, Neuropsychiatrist Dr. Jennings, on October 13 (with another appointment in the offing for October 23), suggesting that he return to work on a trial basis. Although Cabana expressed gratification, within an hour Fimognari telephoned Wysocki and told him he was reading a letter which he (Fimognari) was sending Wysocki by registered mail, terminating his (20-year) employment as of October 15. The letter (G.C. Exh. 6) states that Wysocki's employment was being "terminated" as of October 15, 1979, because of excessive absenteeism. Respondent had paid Wysocki his full salary, without question, from the onset of his disability following the attack on him by the intruder on Respondent's premises, until his discharge on October 15.

Meanwhile, during the interim between his sustaining of the injuries from his encounter with the intruder on June 8, and his discharge on October 15, 1979, Wysocki had filed an unfair labor practice charge with the Board on August 8 and a workmen's compensation claim on September 4—each prepared by his attorney. The charge to the Board (G.C. Exh. 3), involving Respondent's alleged discontinuance of his overtime, as described above, as well as its alleged failure to return Wysocki into the bargaining unit (out of which he also charged he had been euchered by Respondent because of his union activities), was withdrawn by Wysocki on September 11 (G.C. Exh. 4).

At no time has Respondent raised any question with Wysocki concerning the medical validity of his asserted injuries and sequelae. By its July 2, 1979, note to Wysocki, Respondent solicited him to complete an enclosed medical form to "insure your receiving your sickness benefit" (G.C. Exh. 7). And in its report to its insurance carrier on the same date, Respondent indicated the injury arose in the course of his employment, that it did not contemplate laying him off prior thereto, and that there were no circumstances to cause it to question the validity of the claim (G.C. Exh. 7).

Respondent interposed no opposition to Wysocki's claim for unemployment insurance benefits following his termination.[9] Respondent concedes that prior to his discharge there had been no prior criticism of or dissatisfaction with Wysocki's work performance—indeed, his rise in Respondent's hierarchy indicates the contrary—and that it raises no issue concerning his work capability. *Respondent's witness Joseph Fimognari, its manager of labor relations and compensation, conceded at the hearing that if not for the period of absence following the attack on Wysocki by the intruder on its premises during the early morning hours of June 8 Respondent would not have discharged him; and that it is a fact that Wysocki's ensuing absence from work was the precipitating reason for his discharge.*

B. *Discussion and Determination*

Although the Board holds it a violation of the Act for an employer to discharge an employee for indication of intent to pursue a workmen's compensation[10] or similar[11] claim, where its effect is calculated to discourage

[6] Of the foregoing personnel of Respondent, without explanation only Fimognari testified. Thus, Wysocki's account of his conversations with Cabana and Black stands wholly uncontradicted.

[7] Since, as already indicated, without explanation neither Cabana nor Black was called by Respondent to testify, Wysocki's account of these conversations, as well as of all other transactions with them, stands wholly uncontradicted. I credit the testimony of Wysocki, since my observation of his testimonial demeanor persuades me he is worthy of belief.

[8] It will be recalled that when Wysocki became an assistant dispatcher, he was dropped from the union-represented collective-bargaining unit.

[9] Respondent's witness Fimognari testified that its unemployment insurance adviser or counsel determined not to oppose Wysocki's claim, notwithstanding Respondent's alleged "automatic" instruction to oppose it in view of his "discharge." However, it is in any event noted that the Division of Employment Security of the Commonwealth of Massachusetts by its decision of December 6, 1979, overruled Respondent's contention that it had "discharged the claimant because of prolonged absence from work, "finding that" Claimant has established that his prolonged absence was due to a compelling medical reason and that you were properly notified," and accordingly awarded him benefits. Furthermore, as pointed out *supra*, in its July 2, 1979, report to its insurance carrier, Respondent also expressly denied that Wysocki was "laid off or [his] lay off [was] contemplated prior to [the] beginning of this disability" (G.C. Exh. 7). Wysocki testified without contradiction that his attempt in January 1980 to obtain reinstatement or reemployment with Respondent met with a rebuff.

[10] *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979).

[11] *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978) (unemployment insurance claim); *General Teamsters Local Union No. 528, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Theatres Service Company)*, 237 NLRB 258 (1978) (EEOC charge); *Bighorn Beverage*, 236 NLRB 736, 752-753 (1978) (complaint to Montana Department of Health and Environmental Sciences); *Jim Causley Pontiac, etc.*, 232 NLRB 125 (1977) (Michigan OSHA complaint), remanded 620 F.2d 122 (6th Cir. 1980); *Du-Tri Displays, Inc.*, 231 NLRB 1261 (1977) (OSHA and NIOSH [USDHEW] complaints); *B & P Motor Express, Inc.*, 230 NLRB 653, 655 (1977) (threatened Michigan Public Service Commission motor vehicle safety complaint); *The Tappan Company*, 228 NLRB 1389, 1391 (1977) (OSHA complaint), enfd. 607 F.2d 764 (6th Cir. 1979); see also *Air Surrey Corporation*, 229 NLRB 1064 (1977). Cf. *Eastex, Inc.* v. *N.L.R.B.*, 437 U.S. 556, 565-567 (1978); and *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); (California OSHA complaint), cited by the Supreme Court in *Eastex, supra*, 437 U.S. at 566, fn. 15, which generated this decisional progeny. But cf. *Jim Causley Pontiac* v. *N.L.R.B.*, 620 F.2d 122 (6th Cir. 1980); *N.L.R.B.* v. *Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *Air Surrey Corp.* v. *N.L.R.B.*, 601 F.2d 256 (6th Cir. 1979); *ARO, Inc.* v. *N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979); *N.L.R.B.* v. *Dawson Cabinet Co., Inc.*, 566 F.2d 1079 (8th Cir. 1977); *N.L.R.B.* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973); *N.L.R.B.* v. *Northern Metal Company*, 440 F.2d 881 (3d Cir. 1971); with which, however, cf. *N.L.R.B.* v. *Ben Pekin Corporation*, 452 F.2d 205 (7th Cir. 1971), and *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). That employees' pursuit of job-related rights before government agencies (Federal or state) other than the Board constitutes concerted protected activity under the Act's protection is abundantly clear. See *Frank Briscoe Incorporated*, 247 NLRB 13 (1980) (EEOC charge); *Dawson Cabinet Company, Inc.*, 228 NLRB 290 (1977) (discrimination charge to

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such claims by fellow employees, Respondent raises the ingenuous contention that discharge of a workmen's compensation claimant for resulting temporary inability to work, not preclusive of seasonable return to its work force, is not violative. Respondent's contention may be considered ingenuous as well, since such employer action may be regarded as similarly coercive or restraintful against job-related claim-filing by fellow employees, at least from the point of view of affected employees, the line separating discharge for filing and discharge for work absence necessarily flowing from the reason for filing being indistinct if not imperceivable. Since a lodestone purpose of the Act[12] is elimination of restraint or coercion over employees' exercise of job rights—including the right to file workmen's compensation and similar claims[13]—it would seem that employee discharge following sequentially upon, or resulting proximately from, the job-related circumstances compelling the work absence and impelling the claim, is likely to be coercive and restraintful against other employees as well as the claimant, in regard to taking such job-related actions and exercising such a job-related right. If an employee may not, under the Act, be discharged for filing a workmen's compensation claim, but may, on the other hand, be out-of-hand discharged for necessarily absenting himself from work because of the very circumstances giving rise to the claim[14]—as here contended—the Act's protection against discharge for filing the claim would be rendered nugatory and, instead, itself become converted into a restraintful and coercive weapon to justify the discharge. In my view, to effectuate the distinction sought by Respondent would be to exalt form over substance, under the circumstances of the instant case, at any rate (and without need to construct universal principle[15]), involving an at least acceptable employee of some 20 years' standing. I accordingly reject Respondent's contention, and find that but for his filing of his workmen's compensation claim Wysocki would not have been discharged and, accordingly, that his filing of that claim was, in violation of Section 8(a)(1) of the Act, the proximate reason for that discharge.[16]

Wysocki's Status as an Employee under the Act

It remains to consider Respondent's additional contention that Wysocki was a supervisory employee not within the Act's protection.

At the outset, I express the view and hold that even if Wysocki had been a "supervisor" and therefore not an "employee" within the Act's definition, Section 8(a)(1) of the Act would nevertheless have been violated by his discharge under the circumstances here, since the basis for Respondent's action—i.e., his workmen's compensation claim—would have been nonetheless coercive and restraintful[17] toward other employees. Cf. *Iron Workers* v. *Perko*, 373 U.S. 701, 707 (1963); *N.L.R.B.* v. *Better Monkey Grip Co.*, 243 F.2d 836, 837 (5th Cir. 1957); *N.L.R.B.* v. *Talladega Cotton Factory, Inc.*, 213 F.2d 209, 215-217 (5th Cir. 1954); *General Services, Inc.*, 229 NLRB 940 (1977), enforcement denied 84 LC para. 10826 (5th Cir. 1978).[18]

Department of Labor), reversed. 566 F.2d 1079 (8th Cir. 1977); *Leviton Manufacturing Company, Inc.* v. *N.L.R.B.*, 486 F.2d 686, 689 (1st Cir. 1973) (labor-related civil suit); *GVR, Inc.*, 201 NLRB 147 (1973) (wages and hours complaint to U.S. Army and Department of Labor); *Marathon Oil Company*, 195 NLRB 365, 367-368 (1972), enfd. 478 F.2d 1405 (7th Cir. 1973) (complaint to state highway police concerning overloads); *B & M Excavating, Inc.*, 155 NLRB 1152, 1154 (1965), enfd. 368 F.2d 624 (9th Cir. 1966) (claims to state labor commission for overtime); *Socony Mobil Oil Co.* v. *N.L.R.B.*, 357 F.2d 662, 663-664 (2d Cir. 1966) (ship safety complaint to U.S. Coast Guard; *Walls Manufacturing Company* v. *N.L.R.B.*, 321 F.2d 753 (D.C. Cir. 1973), cert. denied 375 U.S. 923 (1963) (complaint to state health department regarding unsanitary restroom).

[12] Preamble ("Declaration of Policy"), and Secs. 1, 7, and 8(a)(1).

[13] Even if only a single employee files such a claim, his discharge for so doing corrodes and restrains the job-related right of all employees to do so. Unimpeded, uncoerced availability of workmen's compensation rights is of substantial concern to all employees since it is a legislatively built-in feature of their wages and terms and conditions of employment, and their unfettered access to those rights is central to enjoyment of that "mutual aid or protection" (Act, Sec. 1) which the Act is purposed to protect. See *Alleliua* and other cases cited *supra*, fns. 10 and 11.

[14] It will be recalled that Respondent's labor relations and compensation manager, Fimognari, conceded that but for Wysocki's work absence following his industrial accident of June 8 he would not have been discharged. It is therefore unnecessary to blunt the issue by conducting a *post mortem* on his antecedent attendance record.

[15] Any pretended concern by Respondent over an unduly prolonged or open-ended work absence by an injured employee substantially impairing an employer's ability to maintain its business operations—*not here credibly established*—could readily be handled by, for example, according such an employee who has necessarily been "replaced," a "*Laidlaw*"-type right to eventual reinstatement instead of absolutely discharging him and terminating his pension and other rights, as herein, after some 20 years of employment. Cf. *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[16] I further find, upon the record as a whole, that the reason advanced by Respondent for Wysocki's discharge—namely, his excessive absenteeism—was pretextual. Respondent conceded no dissatisfaction with his previous work performance; there is no contention of reprimand, censure, admonition, or warning of termination; Respondent's own July 1978 evaluation or "performance appraisal" of Wysocki expressly states that his "Scheduled Work Record" was "Good" (Resp. Exh. 14, p. 1); as shown above, Respondent represented to its insurance carrier that it had no intention of laying him off; Respondent discharged Wysocki within his allowable 6-months' sick leave period; Respondent took no issue with his absence until he indicated he was returning; and Respondent without explanation produced no records of other employees to support its conclusory assertions that his absences were "excessive" or "resulted in substantial inconvenience to the Company" (G.C. Exh. 6), or for comparison purposes to show they were extraordinary or excessive or that its discharge of Wysocki was not disparate. We have been instructed that where a party without explanation fails to produce its own records, it may not be presumed that they would advance its contention. *U.S.* v. *Denver & R.G.R. Co.*, 191 U.S. 84, 91-92 (1903); *N.L.R.B.* v. *Wallick*, 198 F.2d 477, 483 (3d. Cir. 1952). Under the circumstances I cannot give credence to Respondent's contention that it discharged Wysocki—an at least acceptable employee of 20 years' standing who was injured in its service while attempting to repel an intruder into its premises, and for which he filed a workmen's compensation claim supported by Respondent—for this reason.

[17] Cf. *Alleluia* and other cases cited *supra*, fns. 10 and 11.

[18] I also reject any suggestion that because Wysocki is not a member of a bargaining unit he is outside the Act's protections. The Act's protections are not limited to union or unit members.

Nonetheless, were it necessary to reach the issue on the merits, I would and do find and conclude that at the times here material Wysocki was not a supervisor, but was an employee, within the meaning of the Act. To begin with, it is amply settled that resolution of the issue of an employee's supervisory or nonsupervisory status turns on what he does, not on what he is called or on what the employer labels him; focally, on whether he possesses power over subordinates. Nor does an employee's self-assertion that his job is "supervisory"—as here in early 1977, coupled with his correct assertion that his new job of assistant dispatcher was not included in his former bargaining unit, to support exception from union dues deductions from his pay (Resp. Exh. 3)—established his true legal

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In view of the entire record, Respondent's alleged reason for its discharge of an employee of 20 years' standing injured while protecting its interests simply "fails to stand under scrutiny." (*N.L.R.B.* v. *Dant*, 207 F.2d 165, 167 (9th Cir. 1953). Rather, the explanation which does stand up and which I accept and find is that he was discharged because he filed the described workmen's compensation claim as well as the described unfair labor practices charge with the Board.[19]

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted in this proceeding.

2. By discharging its employee Lawrence W. Wysocki on October 15, 1979, under the circumstances detailed and found in "III," *supra*, because he had filed a workmen's compensation claim and filed an unfair labor prac-

status, it being job responsibilities and not labels which are determinative. As a dispatcher, Wysocki's duties were merely to receive transmitted (or at times direct) telephone calls for repairs and to route or detail repairmen convenient to those locations in accordance with Respondent's predetermined policies as amplified by instructions from his superiors. His attendant "responsibilities" for carrying out these spelled-out requirements were essentially routine in character and hardly smack of what is normally regarded as supervisory "authority." Dispatchers of this type perform work that is basically little more than clerical in nature, implementing instructions received without that real substantive power of "command" inherent in supervisors over subordinates.

Credited testimony of Wysocki establishes that his actual duties, responsibilities, and powers as dispatcher are—with the single exception that the CRT computer replaced the former IBM machine system, a change in no way significant to the issue of supervisory status here under consideration—the same as and accurately described in a January 5, 1973, Decision and Direction of Election of Regional Director Robert S. Fuchs in Board Case 1-RC-12433 (G.C. Exh. 9), in which Wysocki served as union observer at the ensuing Board-conducted representation election. Regional Director Fuchs' determination there, to which there is no indication that the Employer took exception, sets forth in comprehensive detail the duties, functions, and responsibilities of the dispatchers, in support of his clearly correct determination that they are not supervisors within the meaning of the Act. Wysocki's credited testimony indicates he had no subordinates or employees working under him; that he worked under the close supervision of his supervisor, Cabana; that as a dispatcher he received from Supervisor Cabana not only specific instructions concerning how to dispatch utility repairmen to repair jobs, but even lists of geographic assignments of repairmen for detail to the nearest jobs on that basis, with directions to him (Wysocki) as to circumstances (e.g., temporary unavailability of otherwise "nearest" repairman) under which and the extents to which departure therefrom was permissible under a system to which he was required reasonably to adhere. I credit Wysocki's denial that he was at no time given nor aware of an alleged "position description" of May 1978 (Resp. Exh. 2), that it does not correctly set forth his duties as dispatcher, and that neither he nor to his knowledge any other dispatcher has at any time exercised any of the functions set forth in paragraph "7" or "8" thereof. (Under the circumstances, I regard and find that the purported position description was either not placed into effect or merely reposed as an unimplemented document in Respondent's files uncommunicated to or acted on by its dispatchers. Even according to Respondent's rebuttal witness Gauthier, another dispatcher, who to my observation and estimation did not measure up to Wysocki in credibility, although he (Gauthier) indicated he had at one time seen a dispatcher's job description, he (Gauthier) only dispatched repairmen in accordance with guideline instructions received by him from his supervisors. It is also to be noted that although Gauthier, as Respondent's witness, specifically referred to Respondent's "Dispatchers' Guide Book" in which "we [dispatchers] have a lot of guides in there to go by," without explanation Respondent failed to produce that book at the hearing. As noted above in another connection, we have been instructed that where a party unexplainedly fails to produce its own records at the hearing, it will not be presumed that they would be assistive to its contentions. *U.S.* v. *Denver & R.G.R. Co.*, 191 U.S. 84, 91-92 (1903); *N.L.R.B.* v. *Wallick*, 198 F.2d 477, 483 (3d Cir. 1952.)

Without explanation, Dispatcher Supervisor Cabana was not called by Respondent to testify, leaving Wysocki's testimony concerning him substantially uncontradicted. However, Cabana's superior, Respondent's labor relations and compensation manager, Joseph Fimognari—not the line supervisor of the dispatchers—testified. Conceding that the job of dispatcher has remained essentially unchanged since 1964 or 1965 (i.e., even antedating the aforementioned 1973 findings and determination of Regional Director Fuchs), Fimognari expresses disagreement with Regional Director Fuchs' unappealed 1973 findings and determination that the dispatchers are not supervisors under the Act, while at the same time unable credibly or unequivocally to specify any significant differences in the dispatchers' duties and responsibilities from those there described and found by Regional Director Fuchs. It is undisputed that the dispatchers possess no authority over the service order clerks (located about 400 feet distant from the dispatchers), who receive incoming repair requests and enter them on the computer (or, in emergency, telephone the dispatchers), and who have their own supervisor. And Fimognari testified that the service repairmen to whom the dispatchers relay the repair requests in turn have their own foremen or supervisors (under the Assistant Manager of Customer Service), who are over them functionally as well as for job training and who evaluate their performance. In part because of his at times mincingly equivocating testimonial *habitus*, I do not credit Fimognari's testimony suggesting that dispatchers may possess some ill-defined power to "assign" or select repairmen for overtime, particularly in view of his equivocative concessions that "Cabana has input into that area" and the strictures under which, even according to his testimony, dispatchers at best operate within the confines of and subject to imposed company policy and Cabana's instructions and close supervision. (I am compelled, rather, in this regard, to believe that dispatchers may under emergency conditions where no regularly geographically scheduled or conveniently located repairman is available, or under other emergency or off-hour conditions, dispatch a repairman or repairmen on overtime, but only in accordance with established company policies and in accordance with Cabana's instructions and strict supervisory control and subject to his veto or overriding—again, hardly sufficient to warrant for dispatchers the rubric of "supervisor" within the meaning of the Act.) Concededly, according to Fimognari, dispatchers possess neither the power to hire, fire, or discipline, nor is there indication they can effectively so recommend—the usual adjuncts of supervisory status.

It is also to be noted that Respondent's "Position Opening" announcement for Wysocki's job as dispatcher in no way indicates that the incumbent is vested with any of the supervisory hallmarks or characteristics specified in the Act; and that it speaks of "supervis[ing] . . . service and meter *orders*." (Emphasis supplied.) Under the Act's definition, however, it is the supervision of *persons* and not of "orders" which is the hallmark of a supervisor. Respondent's repetitious utilization on brief of the ambivalent word "assign," rather than, e.g., "dispatch" or "detail," in describing an aspect of the dispatchers' job is, of course, not dispositive of the issue under consideration. Respondent's own July 1978 evaluation of Wysocki, by Supervisor Cabana, while identifying his position as "Service Dispatcher," explicitly states his section is "Clerical, Dispatch" and in two places under the heading "Subordinates" that he has "None"—and contains absolutely no indication of supervisory status.

Finally, the fact that while a dispatcher Wysocki took some management courses, under company sponsorship, does not establish that he was already a supervisor; rather, it may connote that his performance and potential were viewed by Respondent to warrant his grooming for future supervisory or managerial responsibility. According to Respondent's witness Fimognari, all nonunion employees are eligible to attend such courses. Indeed, Wysocki took such a course even while in the bargaining unit; certainly this did not, nor is it even argued that this did, constitute him a supervisor. For all these reasons, I would and do find and conclude that in his described dispatcher capacity Wysocki was not a supervisor within the meaning of the Act. Cf., e.g., *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *Salt River Valley Water Users' Association*, 204 NLRB 83, 87-93 (1973), enfd. 498 F.2d 393 (9th Cir. 1974); *Western Colorado Power Company*, 190 NLRB 564, 565-566 (1971); *United States Postal Service*, 210 NLRB 477 (1974); *The Connecticut Light and Power Company*, 121 NLRB 768 (1958).

[19] Whether or not the charge filed with the Board had merit or not (no malice, reckless disregard of the truth, or bad faith being involved) is beside the point here, which is whether or not the Charging Party was a supervisor. *General Services, Inc.*, 229 NLRB 940 (1977), enforcement denied 575 F.2d 298 (5th Cir. 1978); cf. *Perko, Better Monkey Grip*, and *Talladega*, *supra*.

tice charge against Respondent and by failing and refusing since then to reinstate or reemploy him, Respondent has discouraged and continues to discourage him and other employees from engaging in such conduct (lawful and protected under the Act), and has interfered with, restrained, and coerced him and other employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1) of the Act.

3. By discharging and failing to reinstate or reemploy Wysocki because of his filing with the Board unfair labor practice charges against Respondent, Respondent has discriminated and continues to discriminate against Wysocki and other employees for filing charges or giving testimony under the Act, and has interfered and continues to interfere with, restrain, and coerce employees, and Respondent has thereby violated and continues to violate Section 8(a)(4) and (1) of the Act.

4. The aforesaid unfair labor practices and each of them have affected, affect, and unless permanently restrained and enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having been found to have violated Section 8(a)(1) and (4) of the Act, Respondent should, as is customary in cases of that nature, be ordered to cease and desist from those and similar violations of the Act. With regard to its unlawful discharge of its employee Wysocki, Respondent should, as is also usual in such cases, be ordered to cease and desist therefrom and to offer him reinstatement, with backpay and interest computed as explicated by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977), and to restore him to full seniority, as well as to reinstate his cancelled pension, life insurance, and other insurance coverages (and make good to him or his estate for any expenditures incurred or benefits due during any cancelled interim period), and all other rights and benefits as if he had not been discharged; and also to expunge from its record all references that he was discharged for valid cause or for any reason based upon or in relation to his work performance, and to refrain from so indicating to any prospective employer or reference-seeker. Respondent should also, as usual, be required to preserve and make available its books and records to the Board's agents for backpay computation and compliance determination purposes; and to post the conventional informational notice to employees.

[Recommended Order omitted from publication.]